In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 969

DAVID J. O'CONNOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 8–15) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. 16) was entered on October 16, 1970. The petition for a writ of certiorari was filed on November 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained from petitioner by a special agent of the Internal Revenue Service prior

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to giving *Miranda* warnings was unconstitutionally used against him in his trial for willful failure to file tax returns.

2. Whether a comment by the trial judge in his instructions to the jury that he thought that petitioner's duty to file a return was undisputed deprived petitioner of a fair trial.

3. Whether the definition of "reasonable doubt" in the instructions was in error.[1]

STATEMENT

After a jury trial, petitioner was convicted of two counts charging willful failure to file income tax returns for the years 1962 and 1963 in violation of Section 7203 of the Internal Revenue Code of 1954. He was sentenced to pay a fine of $10,000 and to five months imprisonment (R. 4–5, 179).[2] On appeal, the First Circuit affirmed.

The Internal Revenue Service, at the request of a Boston newspaper, reviewed its records to determine if Massachusetts state legislators and officers had filed their tax returns (R. 21, 32). No record was found of any 1962 return filed by petitioner, a legislator (R. 19–20, 31). Special Agent Chase was assigned to make a preliminary investigation and on July 20, 1964, called on petitioner at his State House office (R. 12, 18, 33).

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[1] Petitioner sets forth additional questions (Pet. 2) but makes no reference to them in his discussion of reasons for granting the writ (Pet. 5–7). In any event, the additional questions urged are fully answered in the decision below (Pet. App. 13–14).

[2] "R." refers to the record appendix filed in the court of appeals.

After identifying himself, Chase asked petitioner, "Did you file your Federal Individual Income Tax Return for 1962?", to which petitioner replied, "Yes. In fact, I filed my 1963 return, also" (R. 40–41). Two days later, petitioner brought to Chase's office purported copies of a 1962 tax return (Gov't Ex. 8; R. 196) and a letter dated April 14, 1963, from petitioner to the Internal Revenue Service, with which the return allegedly had been enclosed (Gov't Ex. 7; R. 195).

Petitioner's 1963 tax return was filed with the Service on July 29, 1964; petitioner's 1962 return, unsigned by him, was received on August 13, 1964 (R. 130–132). Chase took the 1962 return to petitioner for his signature on September 18, 1964, and at that time advised petitioner for the first time of his constitutional rights (R. 34–35, 131–135).

On May 18, 1965, petitioner attended an interview at the Internal Revenue Service office in Boston, Massachusetts, accompanied by his attorney (R. 136). The attorney conceded the returns for 1962 and 1963 were not timely filed, but said that the failure to do so was not willful (R. 144). However, at a subsequent conference at the Department of Justice in Washington, D.C., petitioner again insisted that he had timely filed his returns (R. 123). In petitioner's absence, his attorney revealed that petitioner had earlier falsely reported to the agents that his accountant had mailed the returns to him for signing and filing, saying that petitioner had done so to protect the accountant (R. 125). A power of attorney from petitioner to his at-

torney was on file with the Service at this time (R. 204–205).

Petitioner was subsequently charged with willful failure to file his 1962 and 1963 tax returns. At his trial, petitioner did not testify or produce any witnesses in his behalf. Pertinent parts of the instructions to the jury were as follows (R. 164, 170, 173–174):

> In this court I may comment on the evidence. * * * I may do that, provided I tell you that in the last analysis you can disregard anything I say as to commenting on the facts in the case. What I do say is merely advisory, in order to help you to return a proper and true verdict * * *.
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> * * * * *
>
> To establish its case and before you can find the defendant guilty of the charges laid, the government must prove all of the following elements beyond a reasonable doubt:
>
> 1, that the defendant was a person required by law to make his tax return for the years in question. I think that I can say there is no dispute here that defendant, because of his income, the evidence showed, was required to file tax returns for these taxable years.
>
> * * * * *
>
> I won't discuss the evidence in this case; it has been presented to you clearly and argued to you by both counsel, members of the jury. But keep in mind the elements of the offense charged that the government must prove beyond a reasonable doubt before you can find

> the defendant guilty, that the defendant was a person required by law to make a return—I think there is no dispute about that at all * * *.
>
> * * * * *
>
> Those three elements must be proved beyond a reasonable doubt before you would be warranted in returning a verdict of guilty. If you find they were proved beyond a reasonable doubt, members of the jury, it is your duty to find the defendant guilty.
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> * * * * *

ARGUMENT

1. Petitioner complains (Pet. 5–6) that the decision of the court below that *Miranda* warnings need not be given in a non-custodial setting during a criminal tax investigation conflicts with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). The decision here, however, is in conformity with the rule in every circuit other than the Seventh. *E.g.*, *Mitchell* v. *United States*, No. 7614, C.A. 1, October 7, 1970, petition for certiorari pending, No. 954, this Term; *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Caiello*, 420 F. 2d 471 (C.A. 2), certiorari denied, 397 U.S. 1039; *United States* v. *Jaskiewicz*, No. 18,387, C.A. 3, September 28, 1970, petition for certiorari pending, No. 884, this Term; *United States* v. *Mancuso* 378 F. 2d 612 (C.A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Prudden*, 424 F. 2d 1021 (C.A. 5), certiorari denied, October 12, 1970, No. 453, this Term; *United States* v. *Miriani* 422 F. 2d

150 (C.A. 6), certiorari denied, 393 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Simon* v. *United States*, 421 F. 2d 667 (C.A. 9), certiorari denied, 398 U.S. 904; *Hensley* v. *United States*, 406 F. 2d 481 (C.A. 10). And although *Dickerson* held that *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case had been transferred to the Intelligence Division," that rule was expressly made applicable only "to interrogations taking place after the date of this decision." 413 F. 2d at 1117. Since the interviews here occurred in 1964, long before the *Dickerson* decision in 1969, the rule there announced would not be applicable to the evidence obtained through these interviews. Moreover, in view of the present policy of the Service to give virtually full *Miranda* warnings to all taxpayers when first interviewed by a special agent,[3] there should be few, if any, further cases that would meet a different fate in the Seventh Circuit than in any other circuit.

2. The contention (Pet. 6–7) that the instructions of the District Court were equivalent to a directed

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[3] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946, 1968, Prentice-Hall Fed. Taxes, par. 55,476.

verdict against petitioner on one of the elements of the crime (the existence of a duty to file a return) is unavailing. The trial judge advised the jury that all three elements of the crime (duty to file, failure to file, and willfulness) "must be proved beyond a reasonable doubt before you would be warranted in returning a verdict of guilty." The instructions viewed as a whole make clear that the judge's comments here questioned by petitioner were in no way intended to alter this requirement.[1] And the instruction to the jury concerning the burden of proof (R. 167–168) was correct.[2] The judge's definition of "reasonable doubt" cannot be said to have shifted the burden of proof to petitioner. Petitioner's obscure suggestion to this effect (Pet. 7.) is therefore similarly without substance.

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[1] In fact, it was undisputed that petitioner had gross income exceeding $600 for each year and thus was required to file income tax returns.

[2] The court instructed the jury (R. 167–168):

> The burden is upon the government to prove the defendant guilty, and it must prove that beyond a reasonable doubt. A defendant is not obliged to prove himself innocent.
>
> * * * * *
>
> [Reasonable doubt] means such doubt as would affect the mind and judgment of the ordinarily reasonable and prudent man in making decisions on important matters. It is proof to a moral certainty as distinguished from an absolute or mathematical certainty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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